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AZ CORP COMMISSION
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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERSMARC SPITZER, Chairman
JIM IRVIN
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON

In the matter of:

DOUGLAS SANCHEZ and KAREN SANCHEZ,
husband and wife,
837 West Kiowa
Mesa, ArizonaDMS POWER CASH FLOW, L.L.C.
1125 W. Baseline, #2-3
Mesa, Arizona 85210PERSANCO, L.L.C.
1125 W. Baseline, #2-3
Mesa, Arizona 85210

Respondents.

DOCKET NO. S-03530A-03-0000

**MOTION FOR ADVERSE INFERENCE
REGARDING FAILURE TO PRODUCE
INFORMATION**Arizona Corporation Commission
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The Securities Division of the Arizona Corporation Commission moves the Administrative Law Judge for a ruling that as Respondents have refused to produce their documents which would demonstrate payments to their investors, as a matter of adverse inference Respondents be deemed not to have made any payments to investors.

The evidence introduced at hearing in this matter will show that Respondents raised over \$700,000 from investors. The Division issued subpoenas to Respondents on January 15, 2003. See Exhibits A and B to Affidavit of Mark Dinell ("Dinell Aff."). Respondents produced some documents pursuant to the subpoena on February 7 and February 12, 2003. See Dinell Aff., Exhibits C and D. However, at the Examination Under Oath of Respondent Douglas Sanchez ("Sanchez"), he admitted that Respondents had not produced substantial portions of their records,

1 including bank statements, checks, deposit information and brokerage account statements and
2 detail. *See* Exhibit E, transcript of Examination Under Oath of Douglas Sanchez ("EUO"), pp. 25-

3 33. Mr. Sanchez also testified:

4 Q. What payments have they received?

5 A. Some cases, it was up to like three or four
6 thousand a month, but I don't have the exact amount.

7 Q. How do you track what you have paid your
8 investors?

9 A. Just through the checking account.

10 Q. Do you keep a record of payments to each
11 investor?

12 A. Just through the check register.

13 Q. How would you know how much you owe an
14 investor such as the Waltons?

15 A. By looking back at the check register and
16 accumulated over the amount of the money.

17 Dinell Aff., Exhibit E, p. 51, lns. 5 -17.¹

18 Therefore, according to Sanchez, the only way he tracks payments to investors (which
19 include cash) is through his check register which he has not produced to the Securities Division.
20 The Securities Division discussed the failure with Respondents counsel, and wrote him at least
21 twice, *see* Dinell Aff., Exhibits F and G, in addition to raising it at the EUO. On July 17, 2003,
22 The Securities Division did receive additional documents from Respondents, namely account

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26 ¹ Mr. Sanchez did go on to testify in his EUO that he was current on all payments to investors. However, as the
Administrative Law Judge will hear from the investors, that testimony was false.

1 statements, but have not received any additional documents supporting payments to investors,
2 including the check register.¹ See Dinell Aff., Exhibits H and I.

3 It is true that there are other possible ways to determine the amount paid to investors.
4 First, of course, the investors might have kept detailed records of the money paid to them by
5 Respondents. However, as the Administrative Law Judge will hear, some of the payments to
6 investors were made in cash, some were made to third parties and some were made by direct
7 deposit by Sanchez. Thus, the investors generally do not have detailed records. Respondents
8 certainly never provided the Investors with IRS Forms 1099s and other summaries of payment as
9 they were required to by law. The Securities Division does not contend that no payments were
10 made to investors. Rather, its position is that it is impossible to prove the amount of payments
11 without Respondents' information. Indeed, as payment is an affirmative defense, the burden is on
12 Respondents to prove they have made any payments. See *B & R Materials, Inc. v. United States*
13 *Fidelity & Guaranty Co.*, 132 Ariz. 122, 124, 644 P.2d 276 (App. 1982).

14 The Division could also subpoena bank and brokerage statements and, after receiving that,
15 request the detail from those entities showing payments to investors. Considering the level of
16 detail required to be obtained, that could take up to a year. Of course, these records are among
17 those subpoenaed by the Securities Division that Respondents failed to produce. To require that
18 delay in order to determine the amount of payments would reward Respondents for their ignoring
19 the Commission's subpoena. Therefore, the Securities Division requests the Administrative Law
20 Judge to issue a ruling finding that as a matter of law, Respondents be deemed to have failed to
21 repay any funds to their investors.

22 Arizona has long held "that where one is possessed of information pertaining to a
23 transaction, which he fails to produce, presumptions will be indulged against him." *Alger v.*
24 *Brighter Days Mining Corp.*, 63 Ariz. 135, 141, 160 P.2d 346 (1945). The Court may presume

25 _____
26 ¹ Sanchez was instructed by his attorney at the EUO to gather all the requested documents. The failure to produce, therefore, is that of Respondents, not their attorney. Dinell Aff., Exhibit E, p. 33.

1 that a refusal to produce material evidence is essentially an admission of lack of merit in an
2 asserted defense. *Sear Roebuck & Co. v. Walker*, 127 Ariz. 432, 436, 621 P.2d 938 (App. 1980).
3 In this case, the Securities Division subpoenaed the information regarding financial accounts and
4 payments, repeatedly requested that Respondents produce the information but received nothing.
5 At this point, it is entirely proper to presume that there is no information to support Respondents
6 claimed payments to investors.

7 Therefore, as Respondents have failed to produce the information, the Securities Division
8 requests that this Court determine, as a matter of law, that Respondents be deemed not to have
9 repaid any funds to the investors.

10 Dated this 18th day of July, 2003

11 ARIZONA CORPORATION COMMISSION

12
13 By 

14 Mark Dinell

15 Attorney for the Securities Division of the
16 Arizona Corporation Commission

17 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
18 filed this 18th day of July, 2003, with:

19 Docket Control
20 Arizona Corporation Commission
21 1200 West Washington
22 Phoenix, AZ 85007

23 COPY of the foregoing mailed this
24 18th day of July, 2003, to:

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